SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 709

PATSY MUTARIELLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

At the time of petitioner's conviction Maximum Price Regulation 169 upon which Indictments 12973 and 12975 rested was in effect only as applied to processing slaughterers and petitioner was not shown to be a processing slaughterer.

Under Indictments Nos. 12973 and 12975, petitioner was charged with violating section 205 of the Emergency Price Control Act of 1942, 56 Stat. 33, as originally enacted, and also as amended by the Act of June 30, 1944, c. 325, Title I, sec. 108(b), 58 Stat. 640, 50 U. S. C. A. Appendix 925(b), in that he made wholesale sales of beef contrary to Revised Maximum Price Regulation No. 169 (7 F. R. 10381), assertedly promulgated under the authority conferred by the same Act in section 201(b), 56 Stat. 29, as amended by

section 104(d), 58 Stat. 637, 50 U. S. C. A. Appendix 904(d).

Petitioner concedes at once that the evidence produced by the Government was sufficient to sustain the charge if at the time of his conviction this Regulation was valid, in effect and shown to be applicable to him. Petitioner, however, contends that these requirements were absent, for the following reasons:

Petitioner was indicted on February 9, 1945 (R. 2a, 6a). He was arraigned February 26, 1945 (R. 2a, 6a) and was placed on trial March 21, 1945 (R. 2a, 6a). The trial continued until March 29, 1945 (R. 2a, 6a) at or about 5 o'clock in the afternoon; but earlier on the same day, without the knowledge of the Trial Judge or counsel, the Emergency Court of Appeals, in the case of *E. Kahn's Sons Co.* v. *Bowles, Price Administrator,* 149 F. 2d 277, held Regulation 169 to be valid as applied to processing slaughterers as defined in the Directive of the Office of Economic Stabilization filed on October 26, 1943 (8 F. R. 14641). At the same time the Emergency Court of Appeals, in the case of *Heinz, et al.* v. *Chester Bowles, Price Administrator,* 149 F. 2d 277, invalidated Revised Maximum Price Regulation No. 169 as applied to non-processing slaughterers.

As defined in section 5 of the Directive, non-processing slaughterers are those "who during the year 1942, or a representative portion thereof, sold and who currently sell 98% or more of the total dressed carcass weight of cattle slaughtered by them in the form of carcasses, wholesale cuts, frozen boneless beef (Army specifications) (carcass equivalent) or ground beef."

On April 2, 1945, petitioner filed a motion in arrest of judgment (R. 216a) calling the attention of the Court to the decision of the Emergency Court in the *Heinz* case (R. 216a). But on the same day, the Emergency Court of Appeals, on stipulation entered in that Court, granted a

motion for vacation of its judgment setting aside RMPR 169 so that additional testimony could be taken. Thereafter, on April 5, 1945, the District Court dismissed petitioner's motion in arrest of judgment and sentenced him to be fined and imprisoned for nine months. Subsequently, pursuant to the leave granted by the Order of the Emergency Court of April 2, 1945, the Price Administrator introduced additional evidence in the *Heinz* case showing the actual experience of operating results of various non-processing slaughterers. This additional evidence led the Emergency Court to conclude, on July 31, 1945, that RMPR 169, *as of that date,* was not invalid. 150 F. 2d 546. The Opinion said:

> "It is sufficient to state our conclusion that the record now contains substantial evidence which, especially in view of recent revisions and enlargements of the subsidy payments, amply supports the Administrator's contention that the regulation is presently valid even as applied to the non-processing slaughterers, whatever it may have been at some period or periods in the past. In this proceeding we are not called upon to render a declaratory judgment as to the validity, or invalidity, of RMPR 169 as of some date in the past. Since, on the record complainants have failed to maintain their burden of establishing that the regulation is presently 'not in accordance with law, or is arbitrary or capricious', we are without power to set it aside."

The Emergency Court then proceeded to enter a judgment dismissing the complaint.

Section 204(b), 50 U. S. C. A. Appendix 924(b) provides as follows:

> "The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry

thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court."

The question is therefore—what, if any, effect does the decision of the Emergency Court of March 29, 1945, have on the present case?

The Circuit Court of Appeals held that the decision in the *Heinz* case did not help petitioner for three reasons:

(1) Because of the express terms of section 204(b) of the Emergency Price Control Act postponing the effectiveness of a judgment of the Emergency Court for thirty days, the judgment of March 29, 1945, did not ever become effective and was not effective at the time of petitioner's conviction some hours thereafter and hence its subsequent vacation on April 2nd, 1945, maintained the Regulation in full force and effect.

(2) Since there was some evidence in the record that petitioner operated a retail meat market in addition to a slaughter-house, the record was silent as to whether, in accordance with the provisions of the Directive of the Office of Economic Stabilization he was a processing or non-processing slaughterer.

(3) Sentence was passed on petitioner after the Emergency Court had vacated its earlier decision.

As to the first ground stated by the Circuit Court of Appeals: In petitioner's written brief filed in the Circuit Court of Appeals, he contended that section 204(b) was invalid when applied to a case where the Regulation was set aside by the Emergency Court for some constitutional

infirmity but conceded its validity where it was set aside because of a mere failure to conform with certain standards set up by the statute. But in oral argument, petitioner strenuously contended that section 204(b) was unconstitutional in either event. But the Circuit Court of Appeals, in its Opinion, did not even pass upon either of these arguments and simply assumed the validity of section 204(b) as though it had not been challenged. Petitioner submits that the validity of this section should be determined by this Court for it is, so far as we have discovered, equally without precedent or validity. Article I, section 1 of the Constitution, provides that "all legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives" and by Article I, section 8, paragraph 18, Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution" its general powers. Petitioner concedes, nevertheless, that this Court has repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. But the Congress cannot so far abdicate its law-making power as to delegate legislative power to the President or any administrative body to exercise an *unfettered* discretion to promulgate codes or regulations which have standing as penal statutes. *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 55 S. Ct. 837.

Petitioner recognizes that in *Yakus* v. *United States,* 321 U. S. 414, 64 S. Ct. 660, this Court upheld constitutionality of the Emergency Price Control Act against attack that it was an unconstitutional delegation of legislative power. It was held that Congress was not precluded from making criminal the violation of an administrative regulation promulgated by the Price Administrator in accordance with

that Act. That was because this Court found that the Act specified the basic conditions of fact upon whose existence, ascertained from relevant data by a designated administrative agency, its statutory commands shall be effective. But the validity of section 204(b) was not passed upon in that case.

In *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 55 S. Ct. 837, the National Industrial Recovery Act was struck down because Congress gave what this Court held to be unlimited discretion to the President to establish codes of fair competition. Section 204(b) of the Emergency Price Control Act is an even worse abdication. Although Congress, in enacting the National Industrial Recovery Act, thought at least that it was providing some safeguards, in the Emergency Price Control Act it did provide them. But after providing them it then completely destroyed them by saying, in section 204(b), that the administrative agency need not follow them, could act directly contrary to them and exercise its completely unfettered discretion for thirty days—and this even after judicial decision that the legislative standards had been flouted. Congress cannot give such unfettered discretion to an administrative agency to promulgate regulations which in effect impose criminal sanctions. Petitioner submits, therefore, that the decision of the Emergency Court of March 29, 1945, was effective immediately despite section 204(b). This brings immediately into operation section 204(e) (2).

Section 204(e)(2) of the Emergency Price Control Act, 50 U.S.C.A. Appendix 924, provides:

> "If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204(b) any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the ex-

tent that such proceeding or judgment is based upon violation of such provision."

But the Circuit Court held that even if this were so petitioner did not bring himself within the protection of the *Heinz* case by showing at trial that he was a non-processing slaughterer. It is quite true that the record is silent as to whether petitioner was a processing or non-processing slaughterer but was it his burden to show that? Petitioner contends that if the Regulation was valid only as to processing slaughterers it was the affirmative burden of the Government to show that petitioner fell in that category. We are not dealing here with a mere exception to a statute which provides that the burden of introducing evidence to show that defendant is covered by the exception rests on him. Petitioner was shown to be a slaughterer. Here there were two kinds of slaughterers, only one of which could be convicted. The Government failed to show that petitioner fell in that group. Petitioner's conviction, therefore, rests upon alternative theories of guilt only one of which is valid. Cf. *Williams* v. *North Carolina*, 317 U. S. 287, 291-2, 68 S. Ct. 207, 210; *Stromberg* v. *California*, 283 U. S. 359, 368, 51 S. Ct. 532, 535. Moreover, it cannot fairly be argued by the Government that petitioner had the burden of showing that he was a non-processing slaughterer for the reason that the District Court trying him had no power to hear evidence on that question. *Yakus* v. *United States*, 321 U. S. 414, 64 S. Ct. 660. At the time the evidence was closed the Emergency Court had not filed its decision, hence such evidence would have been irrelevant except as an attack on the validity of the regulation, which attack the District Court had no authority to hear. Petitioner suggests, therefore, that it is manifestly unfair to place a burden upon him to prove the affirmative of a proposition which the controlling statute

prevents him from proving. Therefore the Circuit Court of Appeals was in error in assuming that the silence of the record destroys the validity of petitioner's contention. So, it is submitted that if petitioner is right in his contention that as of March 29, 1945, the regulation was effective only when applied to processing slaughterers, the Government has failed to prove its case in that it failed to prove that petitioner fell in that group.

The next question arises, therefore, whether a criminal conviction of a defendant is sustainable when the verdict was given at a time when the regulation was invalid by decision of the Emergency Court of Appeals. Or, in other words, does the final judgment of the Emergency Court of Appeals dismissing the *Heinz* complaint operate to obliterate its first judgment for all purposes and as applied to all circumstances?

In the present case we are not concerned with the general rule applicable where the judgment in the case itself is later vacated. Here the judgment invalidating RMPR 169 was given by the Emergency Court of Appeals in a proceeding purely collateral to the present one but directly controlling it because of the peculiar situation created by the jurisdiction conferred upon the Emergency Court of Appeals. When the court held RMPR 169 invalid, in the *Heinz* case, the regulation was no longer in effect in the present proceeding and under section 204(e)(2), quoted above, it became the duty of the Trial Judge (had he known of the decision) to dismiss the indictments. We doubt whether any subsequent judgment of the Emergency Court of Appeals vacating its own invalidating order can be given the retroactive effect of breathing life into a regulation sufficient to justify a criminal conviction obtained at a time when the original invalidating decision was in effect. From March 29, 1945, until April 2, 1945, there was no legally

valid RMPR 169 except as applied to processing slaughterers. Could conduct committed during that period by one not shown to be a processing slaughterer be punished later? Could such person be legally indicted during that period even for conduct occurring before March 29, 1945? We submit the answer must be in the negative. And we contend that *a fortiori* no conviction for any such prior conduct could be had during such period. We are not dealing here with a mere repeal of a valid statute whether such repealing statute does or does not contain a saving clause. Besides, the final judgment of the Emergency Court of Appeals was not a decision that as of the period covered by the indictments, to wit, March 13, 1944 to January 23, 1945, the regulation was valid; the decision merely held that as of its date, viz., July 31, 1945, it was valid. The Emergency Court indicated that it was beyond its province, in that particular proceeding, to determine the first question.

The Circuit Court of Appeals points out that petitioner was not sentenced until April 5, 1945, which was three days after the Emergency Court had vacated its own judgment of March 29, 1945, and therefore at the time of sentence there was no judgment in effect invalidating Regulation No. 169. But it seems to us that this ignores the fact that the judgment necessarily rests upon the conviction and if the conviction was invalid because obtained at a time when there was no valid regulation in effect the judgment itself must fall. The jurisdiction of the court to pronounce the judgment rested upon the validity of the conviction.

It is respectfully submitted that petitioner's motion in arrest of judgment should have prevailed or at the very least, a new trial should have been granted if the decision should turn upon whether he was a non-processing slaughterer.

The evidence does not show a violation by defendant of Revised Maximum Price Regulation No. 355 pertaining to retail meat ceilings.

As stated in the petition, petitioner was charged with selling beef above the price ceiling fixed by Revised Maximum Price Regulation 355 (8 F.R. 4423).

In Indictment 12972 it was alleged that on October 13, 1944, he sold a club steak weighing one pound four ounces at sixty-eight cents per pound for a total price of eighty-five cents whereas the maximum price per pound was fifty-one cents (R. 9a).

In Indictment 12974, first count, he was charged with selling on June 28, 1944, a porterhouse steak weighing one pound one ounce at a price of seventy-five cents per pound for a total price of eighty cents whereas the maximum price allowable was fifty-five cents per pound (R. 23a). Under the second count, he was charged with having sold on January 24, 1945, a club steak weighing one pound fourteen ounces at seventy-five cents per pound for a total charge of one dollar and forty cents, whereas the maximum price per pound was fifty-one cents (R. 24a).

The theory upon which the Government relies to support these charges is that the price paid for the quantity of meat actually received shows that the ceiling price per pound was exceeded. In none of these three sales was there a definite contract for a specified weight of beef. In each instance the O.P.A. agent simply ordered a steak and the Government contends that when the weight of the steak *actually received* is divided into the amount paid, the result shows that the charge must have been in excess of the ceiling. We do not contend that the Government is limited to proof of a direct and specific contract for a certain poundage. We concede that when the proof justifies it the theory upon

which the Government relies is sustainable. We simply contend, however, that under the facts of this case the Government has not sustained its affirmative burden of supporting that theory by showing facts which not only were consistent with guilt but also inconsistent with innocence. Revised Maximum Price Regulation 355, on which the indictments are based, provides that a butcher may weigh the steak *before trimming* and charge the customer for *that weight*, providing that the steak at such times does not contain fat which exceeds one inch in thickness (R. 81a). He may trim the steak either at the customer's direction or in accordance with his usual custom, by cutting the fat or any portion of it therefrom, so that what the customer actually receives weighs less than the weight he pays for. As a matter of fact, the exact loss of weight would be determined by the amount of fat actually trimmed.

This construction is supported by the Revised Maximum Price Regulation 355. Section 20 of the Regulation, inter alia, provides as follows:

> "Sec. 20. Description of retail beef, veal, lamb, and mutton cuts. All retail cuts covered in the following specifications shall be trimmed as described before the cuts may be weighed or sold to the customer. No fat shall be added to any of the cuts before they are weighed or sold to the customer."

The retail ceiling indictments involve the sale of 2 club steaks and 1 porterhouse steak. Section 20(3) i and iii, provides as follows:

> "Porterhouse, T-Bone and club steaks are made from the standard primal short loin. Porterhouse steaks contain a large portion of the tenderloin. T-Bone steaks contain a small portion of tenderloin. Club steaks contain no tenderloin. All fat exceeding one inch in thickness shall be trimmed from these steaks."

It is thus seen that the Regulation leaves it entirely to the discretion of the butcher, in conjunction with the wishes of the customer, to trim as much fat from the steak as is desirable and charge the customer for the total weight (including the meat actually delivered and the fat thus trimmed) providing the total weight does not include fat of a greater thickness than one inch. It is common knowledge that prior to any trimming even the choicest cuts of porterhouse and club steak do not contain fat of a greater thickness than one inch. The trial proceeded upon the assumption that when each of the agents testified that petitioner trimmed the steak it was not meant thereby that after trimming the fat measured one inch in thickness. When the agent said that "he trimmed it well" (R. 59a) clearly it was meant that it was trimmed well below one inch. As a matter of fact, when petitioner exhibited to the jury examples of "choice" and "good" beef, including the outside rind containing the stamp markings, the beef showed not more than one inch of fat according to the statement made by the United States Attorney (R. 167a). But the Opinion of the Circuit Court of Appeals says:

> "It will thus be seen that the regulation imposes its ceiling prices upon the steaks in question after they have been trimmed and not before. Accordingly the defendant was not entitled to include the trimmings in the weight of the steaks which he sold, and was prohibited from charging more than the ceiling price for the meat actually weighed for the customer."

It is submitted this is an incorrect reading of the Regulation and of the record. It is true that a butcher is not entitled to charge for any fat that was in excess of one inch in thickness; but even though he should deliver the steak with no fat at all he would be entitled to charge for any fat actually trimmed within that limit whether weighed

before or after trimming. It is unfortunate that the Circuit Court decided this case upon a theory that was not advanced in the trial court at all, to wit, that when trimming was spoken of it meant trimming down to the legal one inch thickness rather than trimming much below the one inch thickness. No O.P.A. agent would have said that petitioner "trimmed it well" if she meant that he left one inch thickness of fat upon it. It is true that there is no evidence as to the weight of the particular steaks prior to the trimming. It was certainly impossible for petitioner to produce such evidence since the trial took place months after the sale and the Government was in possession of the steak actually purchased unless it was destroyed or disposed of immediately. These steaks were not produced. Petitioner, however, did the next best thing by bringing into court standard cuts with Government markings and offering to prove that a steak, which prior to trimming contained fat of one inch thickness, when properly trimmed to the weight stated in the indictments, would show a sufficient loss of weight to justify the price actually charged (R. 155a, et seq., 162a). Had this evidence been allowed it would have given a clear yardstick to show whether there was an over-ceiling sale and would have prevented decision by the Circuit Court of Appeals on a false assumption. Apart from this, however, we submit that when the Government, in its own case, showed that there was a certain amount of trimming prior to weighing, it had the burden of going further and showing the amount actually lost by trimming. Had the Government in its own case not shown the trimming it would certainly be entitled to rely upon the weight actually received by the agent; but since its own evidence discloses that the untrimmed weight was greater than the trimmed weight and then failed to show what the untrimmed weight was, it has not

made out its case in view of the fact that the defendant was legally entitled to charge for the untrimmed weight. The point we make on this question is that under the Regulation the butcher is entitled to weigh the meat before or after trimming provided the fat does not exceed one inch thickness. There is no evidence as to the weight of the steak before trimming. The Government therefore has not affirmatively shown that the price charged was over the ceiling price. It seems to us that when the Government conceded that the steak was trimmed and that the weight of the steak after trimming was the weight which was used to make up the charge in the indictment, it had the further burden of showing what was the weight prior to trimming. Since the butcher was entitled to charge *that* weight the Government had the burden of showing that at that weight the price charged was over ceiling. But the Government witnesses frankly conceded that they did not know and would not state the weight of the steak prior to trimming. Hence, the Government has not produced sufficient evidence to warrant a conviction even on Indictment 12972 where the sale was made by petitioner.

With respect to the first count of Indictment 12974 charging that defendant on June 28, 1944, sold a porterhouse steak weighing one pound one ounce at a total price of eighty cents, being therefore at the rate of seventy-five cents, violated the maximum price of fifty-five cents allowable by the Regulation, the Government relied upon the testimony of Miss Helen Shackelford who testified that on June 28, 1944, she made a purchase from Harry Sobel. That was the only purchase she ever made at that store (R. 70a) and the petitioner was not present at that time (R. 70a). She does not know how much trimming there was or what the weight of the steak was before he trimmed it (R. 75a). She saw him trim it (R. 78a) and in trimming

it he cut some of the fat but she does not know how much (R. 79a).

The transaction of January 24, 1945, as charged in the second count of Indictment 12974, took place between Mrs. Violet Agran and *Harry Sobel*. It was not shown that the petitioner was present or had any knowledge of the transaction. The Government did not contend that petitioner was guilty because he was the boss and therefore had any guilt imputed to him for the acts of Sobel either on the principle of *respondeat superior* or any other. No such theory of guilt was argued by the Government nor submitted to the jury by the Court. We submit, therefore, that the conviction of petitioner on both counts of Indictment 12974 was without the slightest foundation. Even if the Government *could* properly argue that any act done by Sobel could be imputed to Mutarielli that would not justify a conviction where, as here, Sobel himself was acquitted. Hence, the proposition does not turn on mere inconsistent verdicts. It is true that verdicts of a jury need not be perfectly consistent but on the other hand, since the jury found that Sobel did not violate the ceiling on this sale, it cannot be permitted to find that Mutarielli *did* violate it since his guilt, if any, would be necessarily predicated upon Sobel's guilt.

The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. *Paschen* v. *U. S.*, 7 Cir., 70 F.2d 491, 503; *People* v. *Ermentrout*, 26 Cal. App.2 197, 79 P.2d 102. The Emergency Price Control Act requires that conduct to be criminal must be "wilfull", hence it is essential that petitioner be shown to have had the requisite criminal intent at the time the supposed criminal act was committed. The Circuit Court of Appeals suggests that "The jury may well have found from the evidence that

Sobel was acting solely for the defendant and upon his instructions in making the sales at the prices charged and was himself without any criminal intent." This suggests that petitioner used Sobel as an "innocent agent". The theory is valid enough but the facts of the case refute it for there is no evidence whatever to show that petitioner fixed the price actually charged by Sobel for the weight actually sold. The evidence is simply that he fixed the prices to be charged in the business. So does every employer. To hold an employer criminally liable for an over-ceiling sale by an employee merely because the employer fixed the price scales of the business would be an unwarranted extension of vicarious criminal liability. A more specific and direct participation or procurement must be shown. The difficulty of proof in a criminal case does not eliminate the necessity of it.

Petitioner submits that the judgments of sentence on Indictments 12972 and 12974 should be reversed.

Respectfully submitted,

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